UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

SECURITY INSURANCE COMPANY OF HARTFORD, Plaintiff,	:
-vs-	: Civ. No. 3:00cv1247 (PCD)
TRUSTMARK INSURANCE COMPANY, Defendant.	:

RULINGS ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff and defendant cross-move for summary judgment. For the reasons set forth herein, the motions are **denied**.

I. BACKGROUND

WEB Management, LLC ("WEB) is an underwriting agency that serves as a Managing General Underwriter ("MGU"). In January 1997, WEB became MGU for defendant, an insurer dealing in life, accident and health insurance. In early 1998, TIG Insurance Company ("TIG"), an insurer issuing workers' compensation policies to the public and acting through its reinsurance broker, AON Re, Inc. ("Aon"), approached WEB for purposes of obtaining reinsurance for TIG.

On December 1, 1998, WEB entered into an "Underwriting/administrative Management Agreement" ("UMA") with plaintiff to "underwrite, administer, and manage on [plaintiff's] behalf a portfolio of Workers Compensation reinsurance."[1] In early 1999, WEB signed on plaintiff's behalf a "Workers Compensation Underlying First and Second Excess Reinsurance Agreement" ("1999 Slip") by which plaintiff agreed to reinsure TIG insurance Company for "[l]osses occurring during the 24-

[1] The UMA was amended on January 26, 1999.

month period beginning . . . January 1, 1999 as respects in force, new, and renewal business effective on or after . . . January 1, 1999." Pursuant to the 1999 Slip, TIG was to provide plaintiff a "monthly bordereau[2] of losses" and would expect payment from plaintiff within thirty days of receipt of the same. WEB signed, on behalf of defendant, a document entitled "Certificate of Workers Compensation Reinsurance" ("Certificate"), the original version dated March 11, 1999 and amended on April 19, 1999, by which plaintiff retroceded[3] 100% of the TIG liability to defendant for losses occurring from January 1, 1999 to December 31, 2000. The general conditions of plaintiff's template reinsurance certificate provide that reinsurance may be canceled "at any time on a pro rata basis by either [plaintiff] or the REINSURER(S) giving written notice to the other party by mailing such notice to the Intermediary . . . . The effective date of the cancellation shall be determined by the number of days allowed in the original policy plus 15 additional days not to exceed 90 days in all."

After the 1999 Slip was signed, concerns arose as to TIG's loss reporting to plaintiff. By letter dated September 17, 1999, Stephen Wright, Managing Principal of WEB, notified Edward O'Brien, Vice President and Chief Underwriting Officer of Alternative Risk Transfer Strategies ("Artis"), an affiliate of plaintiff, that defendant "cancels reinsurance coverage for the TIG carve-out workers compensation treaty . . . effective 12/31/99 due to reporting non-compliance." On the same day,

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[2] A bordereau has been defined as "a document identifying and providing a summary of information as to that, and any other, risks reinsured within the reporting period." *Compagnie De Reassurance D'Ile de France v. New Eng. Reinsurance Corp.*, 57 F.3d 56, 65 (1st Cir. 1995). The exact contents of such a document is disputed by the parties.

[3] A primary insurer is directly liable to the insured through its insurance policy. The primary insurer may enter into an agreement by which it transfers, or cedes, some portion of its risk to another insurer, or the reinsurer, which agrees to indemnify the primary insurer in exchange for a portion of the premium received from the insured. The reinsurer may then seek to cede some portion of its risk to another reinsurer through a retrocession agreement. Through these agreements, the risk of loss is distributed among a number of companies. *See* Charles F. Corcoran, III, *Reinsurance Litigation: A Primer*, 16 W. NEW ENG. L. REV. 41, 41-43 (1994).

Stephanie Raymond, Counsel for Artis, sent a letter to Sheila Bohuslav at Aon, TIG's agent, stating that plaintiff was terminating the 1999 Slip for TIG's "failure to provide monthly reports summarizing the losses associated with the Policies . . . . Such failures constitute a material breach of Article 8 of [the 1999 Slip]."

By letter dated October 12, 1999, Robert Bima, Senior Vice President for Aon, notified Stephanie Raymond that it was enclosing a loss bordereau and had set up systems to ensure timely reporting. The letter further stated that "[t]his matter has been remedied within a reasonable time of notice" and "TIG rejects your attempt to cancel on an extra-contractual basis and is putting you on notice that TIG deems the contract of reinsurance to be valid for the term of 24-months." By letter dated October 15, 1999, Edward O'Brien notified Stephen Wright that "WEB has provided TIG with a two year reinsurance contract. In the event TIG does not accept our cancellation notice, [plaintiff] must remain on the program for another year." By letter dated November 16, 1999, Raymond Lester, defendant's vice president and general counsel, notified Stephanie Raymond that defendant "simply cannot accept a refusal of the 12/31/99 termination," citing as its bases failure to provide loss reporting for four months prior to termination, failure to provide sufficient information in the report attached to the Aon letter and defendant's inability because of the deficiencies to seek reimbursement from its retrocessionaires. As of November 16, 1999, defendant had not paid any claims relating to the Certificate and defendant had not received any claims from ARTIS on behalf of plaintiff.

By letter dated December 9, 1999, Robert Bima and Sheila Bohnslav of Aon notified Robert Schultz of Artis that "TIG is agreeable to cancellation of the . . . Agreement as of January 1, 2000, subject to . . . [c]ancellation to be on the basis of run-off of business in-force at December 31, 1999, with rates in effect at December 31, 1999 to apply to premiums earned on business protected under the run-off." TIG did not supply a bordereau of losses for November and December 1999 or January and February 2000. By letter dated June 6, 2000, Stephanie Raymond notified Sheila Bohuslav of Aon that plaintiff was canceling the policy with TIG for failure to receive the April loss accounting.

II. STANDARD

A party moving for summary judgment must establish that there are no genuine issues of material fact in dispute and that it is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). In determining whether a genuine issue has been raised, all ambiguities are resolved and all reasonable inferences are drawn against the moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962); *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445 (2d Cir. 1980). Summary judgment is proper when reasonable minds could not differ as to the import of evidence. *Bryant v. Maffucci*, 923 F.2d 979, 982 (2d Cir. 1991). "[W]hen both parties move for summary judgment, asserting the absence of any genuine issues of material fact, a court need not enter judgment for either party. . . . Rather, each party's motion must be examined on its own merits, and in each case all reasonable inferences must be drawn against the party whose motion is under consideration." *Morales v. Quintel Entm't, Inc.*, 249 F.3d 115, 121 (2d Cir. 2001).

III. DISCUSSION

Defendant argues that the Certificate expressly permits termination on ninety days notice and, even if termination were not expressly permitted, the parties mutually terminated the Certificate by their letters dated September 17, 1999.[4] Plaintiff argues that defendant was not prejudiced by loss reporting delays that any reporting delays were not attributable to bad faith on its part, that any breach of the Certificate was not material, that defendant was obligated to follow its settlement with TIG and that defendant is obliged to provide coverage during the runoff period because its agent accepted premiums on its behalf without objection.

A. Express Terms of the Agreement

It is without question that original and amended versions of the Certificate were "subject to the GENERAL CONDITIONS attached hereto." It is further without dispute that the generic template version of plaintiff's policy containing a heading entitled "General Conditions" expressly provided for cancellation on ninety days notice. At issue is whether plaintiff's general conditions were incorporated by reference into the agreement.

"Generally, incorporation by reference of existing documents produces a single contract which includes the contents of the incorporated papers." *Randolph Constr. Co. v. Kings East Corp.*, 165 Conn. 269, 275, 334 A.2d 464 (1973). The document to be incorporated need not be attached but must be clearly identified. *See id.* at 275-76. "In the absence of an express provision, incorporated documents may neither expand nor restrict the obligations of the parties under the basic contract." *Id.* at 275.

The Certificate at issue expressly incorporates the terms of an attached document. It is further undisputed that no document describing "General Conditions" was so attached. The Certificate does not expressly identify the document from which it defines its General Conditions, i.e., it does not

4 The parties, through their citation to Connecticut law, have thereby consented that it is the applicable law. *See Hannex Corp. v. GMI, Inc.*, 140 F.3d 194, 203 n.7 (2d Cir. 1998).

reference a unique identifier that would conclusively establish the source of the conditions. Given the contrary views propounded by the parties as to the genesis of the Certificate, which includes different templates and drafters, it cannot be said with any certainty as a matter of law that the ambiguous phrase "General Conditions" incorporates the document permitting termination, thus defendant is not entitled to summary judgment on this basis.[5]

B. Mutual Termination of Contract

Defendant argues that the September 17 termination letter sent from defendant to plaintiff and the letter sent on the same day from plaintiff to TIG constitutes a mutual termination of the Certificate. Plaintiff responds that there was no agreement to cancel the Certificate, that its cancellation notice to TIG was in response to defendant's notice and that any "mutual" agreement lacks consideration.

"[R]escission or abandonment of contracts, like entry into a contractual relation, depends upon the intent of the parties and that the relevant intent is to be inferred from the attendant circumstances and conduct of the parties." *Rowe v. Cormier*, 189 Conn. 371, 372-73, 456 A.2d 277 (1983) (citations and internal quotation marks omitted); *see also Yale Co-operative Corp. v. Rogin*, 133 Conn. 563, 567-68, 53 A.2d 383 (1947) ("[P]arties to [a] contract could as validly agree to rescind it as they could agree to make it originally."). Whether the parties have indeed intended to do

5 Plaintiff argues that defendant may not establish a genuine issue of material fact using affidavits that contradict prior testimony at a deposition, specifically raising concerns as to the affidavits of Robin Elkwall and Charles Bastan, WEB representatives, signed after their depositions. *See Hayes v. N.Y. City Dep't of Corr.*, 84 F.3d 614, 619 (2d Cir. 1996). As stated in ruling on defendant's motion to withdraw an admission, the documents were provided to defendant less than two weeks prior to the deposition and there is no indication that the documents were presented to the deponents. *See Perma Research & Dev. Co. v. Singer Co.*, 410 F.2d 572, 579 (2d Cir. 1969)(providing an exception for newly discovered evidence). There is also an exception in the event the deponents recollection was refreshed after the deposition. *See Russell v. Acme-Evans Co.*, 51 F.3d 64, 67-68 (7th Cir. 1995) (when a "lapse of memory is in the circumstances a plausible explanation for the discrepancy"). The affidavits will not be disregarded based on the difference nor based on allegations of impropriety accounting for any difference.

so is a question of fact. *See Rowe*, 189 Conn. at 372-73. A mutual release of obligation under a contract is, in and of itself, sufficient consideration for a rescission. *See Yale Co-operative Corp.*, 133 Conn. at 567-68.

Defendant has not established recission as a matter of law. There is a genuine disagreement as to whether plaintiff's letter to TIG was responsive to defendant's letter or a manifestation of mutual assent to abandon its rights under the Certificate. *See id.* The attendant circumstances do not conclusively support defendant's argument as there appeared to be a degree of uncertainty as to whether plaintiff could cancel its agreement with TIG. If the result of plaintiff's cancellation of its agreement with defendant would be to render it wholly accountable to TIG for any loss, such would constitute a questionable business decision on plaintiff's part. The present facts do not manifest the abandonment of rights under the Certificate that would be anticipated if both parties mutually consented to termination of the agreement. Such abandonment of rights may be supported by the parties' actions that are wholly outside the agreement and a complete lack of communication between parties. *See id.* at 569. Both plaintiff and defendant have produced numerous documents that indicate regular communications between the parties and conduct arguably consistent with the obligations of the Certificate. It is therefore unclear as a matter of law whether the parties mutually consented to termination of the Certificate.

C. Prejudice for Reporting Delays

Plaintiff argues that defendant has not established that it was in any way prejudiced by the delay, thus it was not entitled to cancel the Certificate.

There is no state law determining precisely what standard to apply in analyzing the effect of late notice of claims on an agreement between a reinsurer and a retrocessionaire. As such, this Court must estimate how the Connecticut Supreme Court would rule on the issue if so presented. *See Calvin Klein, Ltd. v. Trylon Trucking Corp.*, 892 F.2d 191, 195 (2d Cir.1989). Although there is no precedent addressing late notice claims in a retrocession agreement, Connecticut has addressed the issue of late notice of claims between a primary insurer and an insured. *See Aetna Cas. & Sur. Co. v. Murphy*, 206 Conn. 409, 418, 538 A.2d 219, 223 (1988). In such cases, the insured must establish that the insurer was not prejudiced by the reporting delay. *Id.* at 418 ("If it can be shown that the insurer suffered no material prejudice from the delay, the nonoccurrence of the condition of timely notice may be excused because it is not . . . a material part of the agreed exchange." (internal quotation marks omitted)).

Both parties argue that the above standard should not be applied to late notice claims in reinsurance agreements.[6] Defendant argues that no prejudice from the delay need result to terminate reinsurance agreements whereas plaintiff argues that the reinsurer must show resulting prejudice. Plaintiff cites *Unigard Sec. Ins. v. N. River Ins. Co.*, 4 F.3d 1049 (2d Cir. 1993), as dispositive of the question.

Unigard Sec. Ins. Co. was decided under New York law, which is not directly analogous to Connecticut law on insurance agreements. Under New York law addressing late notice claims in primary insurance relationships, "[a]bsent a valid excuse, a failure to satisfy the notice requirement

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6 One federal court, without articulating precisely why it did so, applied the standard set forth in *Aetna Cas. & Sur. Co.* in resolving a late notice claim in a reinsurance agreements. *See Travelers Ins. Co. v. Cent. Nat'l Ins. Co. of Omaha*, 733 F. Supp. 522, 528 (D. Conn. 1990)(concluding that the late notice standard between reinsurer and insurer mirrors the standard between insurer and insured).

vitiates the policy . . . and the insurer need not show prejudice before it can assert the defense of noncompliance." *Sec. Mut. Ins. of N.Y. v. Acker-Fitzsimons Corp.*, 31 N.Y.2d 436, 440, 340 N.Y.S.2d 902, 293 N.E.2d 76 (1972); *Unigard Sec. Ins. Co. v. N. River Ins. Co.*, 79 N.Y.2d 576, 581, 584 N.Y.S.2d 290, 594 N.E.2d 571 (1992) ("the notice provision for a primary insurer operates as a condition precedent and that the insurer need not show prejudice to rely on the defense of late notice"). The New York "no prejudice" rule is an exception to two general contract principles: (1) that one seeking to avoid contractual obligations to perform must demonstrate a material breach or prejudice and (2) that a contractual duty will not be construed as a condition precedent absent clear language showing that the parties intended to make it such. *Unigard Sec. Ins.*, 79 N.Y.2d at 581. Addressing a certified question as to whether the "no prejudice" standard should apply to late notice claims in reinsurance agreements, the New York Court of Appeals concluded that "there is no sound reason to depart from the general contract law principle that a breach will excuse performance only if it is material or demonstrably prejudicial." *Id.* at 583. That court thereby determined that in such agreements "the reinsurer must demonstrate how it was prejudicial and may not rely on the presumption of prejudice that applies in the late notice disputes between primary insurers and their insureds." *Id.* at 584.

Connecticut law need not resolve the harshness of a "no prejudice" standard as the late notice standard already contemplates the effect of prejudice. The standard applicable to primary insurance agreements resulted, in part, from the dissent in *Plasticrete Corp. v. Am. Policyholders Ins.*, 184 Conn. 231, 240-44, 439 A.2d 968 (1981) (Bogdanski, J., dissenting). The dissent reasoned that the "defendant must show prejudice to itself from the late notice in order to be relieved of its responsibility under the policy," *id.* at 241, because as it is "the insurer choos[ing] to disclaim liability, it is proper to place the burden of persuasion on it," *id.* at 244. Notwithstanding this proposed allocation of burdens, the burden of proving the insurer's lack of prejudice was placed on the insured "who is seeking to be excused from the consequences of a contract provision with which he has concededly failed to comply." *Aetna Cas. & Sur.*, 206 Conn. at 419-20. In doing so, that court expressly acknowledged that a majority of jurisdictions allocated the burden of proving prejudice on the insurer, *see id.* at 423, but instead allocated the burden to the party initially failing to comply with its contractual obligations.

It is therefore unlikely that the Connecticut Supreme Court would adopt the late notice standard set forth in *Unigard*. Although there are noteworthy differences in the relationship of reinsurer and reinsured[7] and primary insurer and insured, it is in no way apparent that this distinction would cause Connecticut to allocate the burden of showing prejudice differently or to adopt a "no prejudice" standard. Such would be consistent with the principle that "in the absence of conduct that is 'wilful,' a contracting party may, despite his own departure from the specifications of his contract, enforce the obligations of the other party with whom he has dealt in good faith." *Id.* at 413. The burden is therefore on the reinsured failing to provide timely notice to establish that the reinsurer was not prejudiced by the late notice.

Having presumed incorrectly that Connecticut law would adopt the standard set forth in *Unigard Sec. Ins.*, plaintiff's argument is self-defeating. It is plaintiff's burden to establish that defendant was not prejudiced, not defendant's burden to establish that it was so prejudiced. *Id.* at

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[7] Notwithstanding defendant's reference to the variety of reinsurance agreements (i.e., facultative or treaty) and degrees of separation between the reinsurer and the insured (i.e., reinsurer or retrocessionaire), there is nothing to suggest that Connecticut law would attempt to fashion a different standard for each potential type of agreement.

419-20. Plaintiff must therefore provide evidence that defendant was not prejudiced by the delay rather than simply leave defendant to its burden to prove that it was.[8] Plaintiff therefore has not established that there is no genuine issue of material fact as to defendant's lack of prejudice.

D. Good Faith

The absence of prejudice may forgive technical non-compliance with the agreement, but such will not be the case when the non-compliance results from dealings not undertaken in good faith. *See Aetna Cas. & Sur.*, 206 Conn. at 413. Under Connecticut law, good faith requires that "neither party do anything that will injure the right of the other to receive the benefits of the agreement." *Home Ins. Co. v. Aetna Life Cas. Co.*, 235 Conn. 185, 200, 663 A.2d 1001 (1995). Bad faith has been described as the absence of good faith. *See Buckman v. People Express, Inc.*, 205 Conn. 166, 171, 530 A.2d 596 (1987). Bad faith implies

> actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. . . . Bad faith means more than mere negligence; it involves a dishonest purpose.

Habetz v. Condon, 224 Conn. 231, 237, 618 A.2d 501 (1992)(internal quotation marks omitted). This definition is not inconsistent with that set forth in *Unigard Sec. Ins. Co.*, 4 F.3d at 1069, which defined bad faith in a reinsurance relationship as

> gross negligence or recklessness. If a ceding insurer deliberately deceives a reinsurer, that deception is of course bad faith. However, if a ceding insurer has implemented

8 In support of its argument that it was prejudiced, defendant argues that it did not have the use of $3,023,720.93 it paid out and could not recover for want of claim data.

> routine practices and controls to ensure notification to reinsurers but inadvertence causes a lapse, the insurer has not acted in bad faith. But if a ceding insurer does not implement such practices and controls, then it has willfully disregarded the risk to reinsurers and is guilty of gross negligence. A reinsurer, dependent on its ceding insurer for information, should be able to expect at least this level of protection, and, if a ceding insurer fails to provide it, the reinsurer's late loss notice defense should succeed.

It is not apparent that plaintiff's failure to provide timely loss data to defendant rises to the level of either gross negligence or recklessness. *See Certain Underwriters at Lloyd's London v. Home Ins. Co.*, 783 A.2d 238, 241-42 (N.H. 2001)(failure of ceding insurer to report claims until eleven years after notification by insured constitutes recklessness). It is undisputed that TIG was not providing timely loss data to plaintiff resulting in plaintiff's consequent inability to forward the same to defendant. Plaintiff has provided evidence in support of its position that it aggressively sought to obtain data from TIG but that its efforts were unsuccessful. It is not apparent that this failing rises to the level discussed in *Certain Underwriters at Lloyd's London*, in which an insurer possesses claim data but withholds the information for eleven years. *See id.* As neither plaintiff nor defendant were in possession of the data, it cannot be said that defendant was in any worse position than plaintiff in judging the risks and both were equally disadvantaged by TIG's systemic failures. *See Unigard Sec. Ins. Co., Inc.*, 4 F.3d at 1069. Defendant therefore has not established bad faith on the part of plaintiff in failing to provide timely loss reporting.

E. Materiality of Breach

In determining whether a breach is material, Connecticut applies the test set forth in the *Restatement (Second) of Contracts* § 241. *See Bernstein v. Nemeyer*, 213 Conn. 665, 672, 570 A.2d 164 (1990). The following considerations are relevant to a determination of whether a failure to perform is material: (1) the extent to which the injured party will be deprived of the reasonably expected benefit; (2) the extent to which the injured party may be adequately compensated for that portion of the benefit deprived by the failure; (3) the extent to which the non-performing party will suffer forfeiture; (4) the likelihood that the party failing to perform will cure the failure, taking into account all circumstances including any reasonable assurances; and (5) the extent to which the behavior of the non-performing party comports with standards of good faith and fair dealing. *Id.* This standard, stating circumstances rather than rules, must be applied considering the facts of each case and in furtherance of the purpose of securing the expectation of an exchange of performances for each party. *669 Atl. St. Assocs. v. Atlantic-Rockland Stamford Assocs.*, 43 Conn. App. 113, 128, 682 A.2d 572 (1996) (internal quotation marks omitted). As the ultimate question of whether a breach is material depends on consideration of the above factors referring to the intent of the parties as evidenced by all circumstances surrounding a transaction, the issue is ill-suited to resolution on summary judgment. *See Sahadi v. Cont'l Ill. Nat'l Bank & Trust Co. of Chicago*, 706 F.2d 193, 196-97 (7th Cir. 1983).

Under the present circumstances, there are genuine issues as to whether defendant lost the benefit of the agreement through plaintiff's inability to provide timely reporting. *See Bernstein v. Nemeyer*, 213 Conn. at 672. If defendant ultimately was able to manage its loss reserves, notwithstanding the untimely reports from plaintiff, there may be some doubt as to whether it was "deprived of the benefit which he reasonably expected from the exchange." RESTATEMENT (SECOND) OF CONTRACTS § 241 cmt. b. However, there can be no question that if its non-performance is deemed material, plaintiff is directly liable for coverage ceded to defendant, thus it will suffer a significant forfeiture. *See id.* § 241 cmt. d. Considering these concerns in addition to the more than $3 million claimed as uncollectible because of the inability to provide loss documentation to defendant's retrocessionaires, there remains a genuine issue as to whether plaintiff's breach was material.

F. Applicability of "Follow the Settlement"/"Follow the Fortunes" Doctrine

Plaintiff argues that defendant is obliged to adopt the "settlement" between it and TIG providing for runoff coverage. Under the "follow the settlement" or "follow the fortunes" doctrine, a reinsurer may not second guess any good faith liability determinations made by the reinsured in settling claims. *See Christiania Gen. Ins. Corp. v. Great Am. Ins. Co.*, 979 F.2d 268, 280 (2d Cir. 1992). The principle does not change the substance of the reinsurance contract. *Mentor Ins. Co. (U.K.) Ltd. v. Norges Brannkasse*, 996 F.2d 506, 516 (2d Cir. 1993).

The rationale behind the principle is to "prevent reinsurers from second guessing good-faith settlements and obtaining de novo review of judgments of the reinsured's liability to its insured." *N. River Ins. Co. v. CIGNA Reinsurance Co.*, 52 F.3d 1194, 1199 (3d Cir. 1995). Reinsurers may therefore be obligated to cover agreements made by primary insurers to resolve claims. *See id.* at 1197 (holding that reinsurers must indemnify primary insurers for expenditures made in support of a process established between insurers and asbestos producers). However, "reinsurers are liable only to the extent of the risk they agreed to reinsure." *Bellefonte Reinsurance Co. v. Aetna Cas. & Sur. Co.*, 903 F.2d 910, 914 (2d Cir. 1990).

Plaintiff has provided no support for the proposition that this principle is implied in reinsurance agreements in Connecticut absent express agreement involving, for example, a "follow the settlement" clause. *See N. River Ins. Co. v. Employers Reinsurance Corp.*, 197 F. Supp. 2d 972, 986 (S.D. Ohio 2002) ("[m]ost cases which discuss the 'follow the settlements' or 'follow the fortunes' doctrine were faced with reinsurance certificates which contained express 'follow the settlements' clauses"). Assuming arguendo that Connecticut were to imply such an obligation into a reinsurance agreement, there is further doubt as to whether plaintiff's "novation" with TIG could be deemed a "risk [defendant] agreed to reinsure." *Bellefonte Reinsurance*, 903 F.2d at 914.

There is further doubt as to whether the "follow the settlement" principle applies to an agreement between insurer and reinsurer, i.e., the settlement of a risk in which the insured is no longer a factor. A reinsurer's role is to indemnify to the extent such indemnity is agreed upon without involvement in the claims resolution aspect of primary insurance. *See Unigard Sec. Ins. Co., Inc.*, 4 F.3d at 1053. The allocation of risk principle that inheres in the reinsurance would assume an amorphous quality if underlying indemnity agreements could be reshaped and the interested reinsurer were bound by the terms without its express consent or involvement. The application of the principle of "follow the settlement" would also require the characterization of a business dispute between two insurance companies as a "claim," which is not a logical extension of the notion of "claim" at the primary insurance level. There is little to suggest that the principle would apply to such an arrangement.[9] Plaintiff has therefore not established that defendant was obliged to accept its "novation" with TIG.

G. Acceptance of Premiums by Defendant's Agent

Plaintiff argues that defendant agreed to the terms of its agreement with TIG including runoff premiums through WEB's acceptance of $2 million in premiums. Defendant provided evidence,

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9 *American Bankers Ins. Co. of Florida v. Northwestern Nat'l Ins. Co.*, 198 F.3d 1332, 1336 (11th Cir. 1999), does not support plaintiff's contention that the "follow the settlement" policy applies with equal force in reinsurance agreements such as that in the present case. In *American Bankers Ins. Co. of Florida*, the primary insurer submitted a fraudulent claim seeking indemnification from its reinsurer, the payment of which was later disputed by the retrocessionaire. The dispute thus revolved around the payment of a claim, not the modification of an agreement between insurer and reinsurer.

through an e-mail dated January 25, 2000, that WEB would not handle negotiations with plaintiff but rather negotiations would proceed directly between defendant and plaintiff.[10] On May 9, 2000, defendant attempted to return the March and May premium distributions citing the December 31, 1999 termination. Finally, by letter dated June 1, 2000, Raymond Lester, counsel for defendant, stated that it would not accept any risk from the "secret" agreement and was returning premiums tendered.

Although plaintiff cites to law supporting the proposition that the acceptance of premiums by an agent bind the principal, *see, e.g., Arkwright-Boston Mfrs. Mut. Ins. Co. v. Calvert Fire Ins. Co.*, 887 F.2d 437, 440 (2d Cir. 1989), the cases cited do not address a prior revocation of the agent's authority to act on its behalf. "Apparent authority terminates when the third person has notice that . . . the principal no longer consents that the agent shall deal with the third person." *Tomlinson v. Bd. of Educ.*, 226 Conn. 704, 735, 629 A.2d 333 (1993). In light of the January 25, 2000 e-mail and plaintiff's conduct in continuing its premium payments to WEB, it may remains unclear whether WEB was, in fact, defendant's agent in matters affecting the reinsurance agreement. *See Lloyd & Elliott v. Parke*, 112 Conn. 504, 152 A. 825, 826 (1931) ("The so-called contract on its face is nothing more than an order given by the defendant to the agent who had no authority to accept it, but only to forward it to his principal for approval; and which consequently was revocable by the defendant at any time before acceptance by the principal."); *see also* CONN. GEN. STAT. § 38a-760g(5)("The reinsurance intermediary-manager shall not. . . [c]ollect any payment from a retrocessionaire or commit the reinsurer to any claim settlement with a retrocessionaire, without prior approval of the reinsurer. If prior approval is given, a report must be promptly forwarded to the reinsurer.").

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10 The e-mail from Steven Wright of WEB to Stephanie Raymond stated "Trustmark has informed me that they wish to negotiate this treaty directly with you, and I have forwarded it on to them."

If WEB's authority to contract on behalf of defendant was revoked, WEB would not appear to have the authority to bind defendant to a contract by accepting a premium from plaintiff. The issue therefore lies not in its acceptance of premiums later refunded but whether plaintiff could bind defendant through an alleged accounting oversight when it had knowledge that the agency relationship had terminated. *Harris v. McPherson*, 97 Conn. 164, 115 A. 723, 725 (1922) ("The principal has absolute power to revoke an agency at any time at his mere option, either with or without reason, and thereby terminate the agent's power and authority to bind the principal by any further acts."). There thus remains a genuine issue as to whether WEB was defendant's agent at the time it received the premiums.

IV. CONCLUSION

Defendant's motion for summary judgment (Doc. 55) is **denied**. Plaintiff's motion for summary judgment (Doc. ___) is **denied**.

SO ORDERED.

Dated at New Haven, Connecticut, August ___, 2002.

Peter C. Dorsey
United States District Judge